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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY LEWIS FRAZER, Defendant and Appellant.	D037855 (Super. Ct. No. SCD154141)

APPEAL from a judgment of the Superior Court of San Diego County, Bernard E. Revak, Judge. Affirmed in part; reversed in part with directions.

Anthony Frazer was convicted of eight counts of robbery based on the robbery of two stores where eight employees were present. He contends the judgment should be reversed because (1) a special instruction given to the jury removed the elements of possession and immediate presence for robbery when the victim was an employee; (2) the jury was not presented with the theory of an employee's constructive possession of the employer's property; and (3) there was insufficient evidence that nonmanagerial employee victims constructively possessed the stolen property. He also asserts his out-

of-court admissions were erroneously admitted because he did not knowingly and intelligently waive his *Miranda* rights before the law enforcement interrogation. We reject his contentions of error and affirm the judgment, except as to a sentencing enhancement error conceded by the People.

FACTUAL AND PROCEDURAL BACKGROUND

Frazer was convicted of eight robberies which occurred at two different Kragen Auto Parts stores on two occasions (the first on November 4, 1999, on Convoy Street, and the second on December 10, 1999, on Euclid Avenue) One victim at each store was the manager who could open the safe containing the money, and the remaining six victims were nonmanagerial employees who were present during the robbery. He was also convicted of a petty theft committed on July 19, 2000, at a K-Mart. The jury deadlocked on four charges arising from a third robbery on March 8, 2000, at the Euclid Kragen Auto Parts store, which were dismissed.[1]

Based on two prior serious or violent felony convictions, Frazer was sentenced under the "Three Strikes" law (Pen. Code, § 667, subds. (b)-(i)),[2] to 25 years to life for one of the robberies, with concurrent 25-year-to-life sentences for the remaining robberies and the petty theft with a prior. A one-year consecutive enhancement for a

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1 Unlike the other Kragen robberies, at the March 2000 Kragen robbery the robber wore a ski mask.

2 All subsequent statutory references are to the Penal Code.

prior prison term (§ 667.5, subd. (b)), and a five-year consecutive enhancement for a prior serious felony conviction (§ 667, subdivision (a)(1)) were imposed, for a total term of 31 years to life.

November 4, 1999 Robbery of Kragen Auto Parts on Convoy Street

On November 4, 1999, assistant manager Salvador Serrano was working at the Kragen Auto Parts store on Convoy Street with a crew of four other employees, Mike O'Reilly, John Volpe, Julian Escamilla, and Donald Klaus. Klaus, who was a college student, and Escamilla and Volpe, who were in the Marines, worked part-time at Kragen. Serrano and Klaus were scheduled to work "the floor" that night, i.e, running the store by helping customers.

It was also "weekly truck night" when the store received merchandise, so employees O'Reilly, Escamilla, and Volpe were working as the "truck crew" to put merchandise away while the store was still open. Escamilla was in the back of the store in an area not available to customers stocking brake shoes when the robbery commenced. Volpe, O'Reilly, and assistant manager Serrano were in the aisles putting parts away. The only person who could open the safe was Serrano.

Frazer and an accomplice entered the store. As is customary when working the floor, Klaus greeted them and asked how he could help. The men asked for freeze plugs. Klaus walked behind the parts counter to look up their vehicle year in the computer. The accomplice began pushing Serrano, put a gun[3] to his head, and screamed that Serrano

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3 Apparently the gun used in both Kragen robberies turned out to be a pellet gun.

should tell him where the safe was and identify the manager. The accomplice kept the gun on Serrano's head and forced him to walk to the safe located in the front of the store. Serrano was having trouble opening the safe and the accomplice screamed at him to hurry up if he wanted to see his kids. As Serrano was putting the money from the safe into a bag, the accomplice yelled that Serrano should give him all the money, that the robbers were wanted in three states, and if the employees "screw[ed]" with them, the robbers would kill all the employees.

When employee O'Reilly saw the accomplice with the gun, O'Reilly immediately went down on the floor. Frazer, holding his hand at his belt as if he was carrying a weapon, instructed employees Klaus, Volpe, and Escamilla to get down on the floor. As the employees were laying on the floor, they could hear that Serrano was having trouble opening the safe and heard the accomplice screaming at him to hurry up. Frazer told the employees on the floor to keep their heads down or the robbers would "spray [them] all." As the robbers were leaving, they told the employees that if they came after them, the robbers would kill all of them.

December 10, 1999 Robbery of Kragen Auto Parts on Euclid Avenue

On December 10, 1999, employees Carmen Campa, Oscar Ortiz, and Jorge Gabriel Naranjo were working on the computers at the parts counter at the Kragen Auto Parts store on Euclid Avenue when Frazer entered the store. Frazer asked for the manager, and Ortiz identified himself as the manager even though he was not. Frazer pulled out a gun and said it was a robbery. He put the gun in Ortiz's side and shoved him towards the back. All three employees walked with Frazer to the area where the safe was

located. Naranjo opened the combination lock on the safe, and Campa and Ortiz lay on the floor as ordered by Frazer. Naranjo gave Frazer the money from the safe, and then the money from the cash register.

Frazer's Arrest and Interrogation

On July 19, 2000, an undercover security officer made a citizen's arrest of Frazer after observing him steal two watches from a K-Mart store in Rancho San Diego. A deputy sheriff took custody of Frazer, obtained a *Miranda* waiver and questioned him about the K-Mart theft; he then turned Frazer over to the custody of San Diego police detectives. The San Diego police had received information from Frazer's girlfriend possibly tying Frazer to certain Kragen robberies.[4] Three hours later, after asking if Frazer remembered the earlier advisal of his rights, the San Diego police conducted a videotaped interrogation which lasted about two and one-half hours. During the questioning Frazer made admissions regarding the charged robbery offenses. The videotape was shown to the jurors.

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4 There were a series of Kragen robberies occurring during this time period in addition to the three charged in the instant case. The girlfriend, who was angry with Frazer at the time, told the detective she had seen Frazer's photo on a Crime Stoppers television show. She showed physical evidence to the police including items of property Frazer brought to her house from a Kragen Auto Parts store in Lemon Grove that had been robbed, the toy gun she said Frazer had used in the Kragen robberies, and her black Ford Escort that she let Frazer use and that was consistent with the vehicle described at some Kragen robberies not charged in the instant case. The girlfriend recanted most of her statements at trial.

DISCUSSION

I. *Multiple Robbery Convictions*

The jury was given a standard instruction defining the elements of robbery (including possession and immediate presence), and given a special instruction stating an employee need not have the stolen property "in their immediate control and possession."

Frazer argues: (1) the special instruction removed the elements of possession and immediate presence from the definition of robbery; (2) the jury was not presented with the theory of constructive possession needed to support the convictions based on the six nonmanagerial employees; and (3) even if the jury was presented with the theory of constructive possession, there was insufficient evidence of constructive possession by the six nonmanagerial employees.

To evaluate his arguments, we first review the law governing constructive possession by employees.

A. *Legal Principles Regarding Employee Constructive Possession*

Section 211 defines robbery as the "taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." Employees can be victims of robbery based on constructive, rather than actual, possession of the employer's property. (*People v. Jones* (1996) 42 Cal.App.4th 1047, 1053 (*Jones I*).) Actual possession requires direct physical control, whereas constructive possession can exist when a person without immediate physical control has the right to control the property, either directly or through another person. (*Id*. at p. 1052, fn. 3.) Based on constructive possession, an employee may be a victim of

robbery even though he is not the owner and not at the moment in immediate control of the property. (*People v. Miller* (1977) 18 Cal.3d 873, 880; accord *People v. Nguyen* (2000) 24 Cal.4th 756, 761, 762.) More than one employee may constructively possess the property at the same time. (*People v. Miller, supra,* 18 Cal.3d at p. 881.)

The courts have found employees possess their employer's property even when the particular employees could not personally access the stolen property because of their job functions. (*People v. Downs* (1952) 114 Cal.App.2d 758, 765-766 [two janitors left in sole occupation of premises deemed to possess cash stolen from safe]; *People v. Dean* (1924) 66 Cal.App. 602, 607 [two janitors who were also watchmen deemed to possess cash from safe].) The courts reasoned that the employees were rightfully in possession of the place of employment and its contents and were entitled to possession as against the defendant. (*People v. Dean, supra,* 66 Cal.App. at p. 607.)

In years past, however, the cases usually involved only *one* robbery count and conviction, even if there were multiple employee victims. (See, e.g., *People v. Miller, supra*, 18 Cal.3d at pp. 877-879, 880-881 [one robbery conviction for jewelry stolen from store; victims were sales persons and security guard]; *People v. Arline* (1970) 13 Cal.App.3d 200, 202, disapproved on another ground in *People v. Hall* (1986) 41 Cal.3d 826, 834, [one robbery conviction for cash stolen from cash box; victims were two automobile mechanics]; *People v. Downs, supra,* 114 Cal.App.2d at pp. 765-766; *People v. Dean, supra*, 66 Cal.App. at p. 607.) Multiple robbery convictions were typically sustained only if there were distinct takings from different employees. (See, e.g*., People v. Guerin* (1972) 22 Cal.App.3d 775, 782 [two robbery convictions for taking of cash

from two different cash registers controlled by two different employees]; *People v. Childs* (1980) 112 Cal.App.3d 374, 383 [five robbery convictions for five takings from five bank tellers].)

However, the landscape of robbery changed in 1982, when our Supreme Court in *People v. Ramos* (1982) 30 Cal.3d 553, 587, reversed on other grounds in *California v. Ramos* (1983) 463 U.S. 992, held that a *single taking* of property from the joint possession of two victims constituted *two* robberies, overruling contrary holdings in such cases as *People v. Guerin, supra*, 22 Cal.App.3d at p. 782, and *People v. Higgins* (1972) 28 Cal.App.3d 771, 773-775. In *Guerin*, the appellate court had upheld two robbery convictions arising from the taking of cash from two registers controlled by two store clerks, but reversed a third robbery conviction as to the store manager who had constructive possession of the money in both registers. (*People v. Guerin, supra*, 22 Cal.App.3d at p. 782.) Similarly, in *Higgins*, the appellate court allowed only one of two robbery convictions to stand based on a taking from one cash register controlled by two store clerks. (*People v. Higgins, supra,* 28 Cal.App.3d at pp. 773-775.)

In overruling these holdings, *Ramos* reasoned multiple takings were not required to sustain multiple robbery convictions. (*People v. Ramos, supra,* 30 Cal.3d at p. 589.) Rather, *Ramos* concluded that when two persons in joint possession of a single item of property were subjected to force or fear, two robbery convictions were proper. (*Ibid*.)

Thus, in more recent times, the courts have had to evaluate the impact of the *Ramos* rule supporting a robbery conviction for each person jointly possessing property

and subjected to force or fear, juxtaposed with the rule that employees may be deemed to have constructive possession of the employer's property.

In partially overruling *Guerin*, *People v. Ramos* did not discuss an additional component of *Guerin'*s holding, wherein the appellate court reversed a robbery conviction as to a box boy employee who was present during the robbery but who was not shown to have any control over the stolen money. (*People v. Guerin, supra*, 22 Cal.App.3d at p. 782.) The court in *Guerin* stated: "We can find nothing, other than that he was a co-employee of the other three, to suggest that he had any dominion or control whatsoever over any money." (*Ibid*.)

In contrast, *Jones I, supra*, 42 Cal.App.4th at pp. 1054-1055, held that a separate robbery conviction as to a store truck driver, present during a robbery of cash along with employees who handled the cash, could be sustained. Referring to the rule that an employee who does not have actual possession must act in some representative capacity with respect to the owner so as to have express or implied authority over the item taken, the court in *Jones I* concluded that the store truck driver had "sufficient representative capacity with respect to the owner of the property to be the victim of a robbery." (*Id.* at p. 1054.) The court in *Jones I* observed that the holding in *Guerin* that the box boy had insufficient authority over the stolen property may have been due to his adolescence, but if not so distinguishable on its facts, the court in *Jones I* disagreed with the *Guerin* holding.

A dissent in *Jones I*, citing *Guerin*, concluded there were no circumstances in the case showing the store truck driver had implied authority over the property. (*Jones I, supra*, 42 Cal.App.4th at p. 1057, dis. opn. of Johnson, J.)

People v. Jones (2000) 82 Cal.App.4th 485, 491 (*Jones II*), goes a step further than the majority opinion in *Jones I*, characterizing *Guerin*'s holding regarding the box boy as an "anomaly." *Jones II* concludes "business employees—whatever their function—have sufficient representative capacity to their employer so as to be in possession of property stolen from the business owner." (*Jones II, supra,* 82 Cal.App.4th at p. 491.) Accordingly, *Jones II* upholds attempted robbery convictions as to employees who did not have access to the cash room from which cash was stolen, including a personnel manager, sales associate, pantry clerk, and inventory clerk. (*Id*. at pp. 488-489.)

The holding in *Guerin* stands for the proposition that employee status alone is not enough to give an employee constructive possession of his employer's property for purposes of supporting a separate robbery conviction. In direct conflict, *Jones II* concludes that employee status, regardless of function, *is* alone enough to confer constructive possession. The dissent, and to a limited extent the majority opinions in *Jones I*, support a more fact-based inquiry, i.e., an evaluation of the circumstances of the case to determine if the particular employee has sufficient representative capacity to be deemed to have implied authority over the item taken.

In *People v. Nguyen, supra*, 24 Cal.4th at p. 762, our Supreme Court recently summarized the evolving judicial interpretation of the crime of robbery, noting that "the

theory of constructive possession has been used to expand the concept of possession to include employees and others as robbery victims . . . ." *Nguyen* sets forth in dicta the statement in the majority opinion in *Jones I*, *supra*, 42 Cal.App.4th at page 1054, that the store truck driver had "sufficient representative capacity with respect to the owner of the property to be the victim of robbery." (*People v. Nguyen, supra*, 24 Cal.4th at p. 761.) The issue in *Nguyen* was whether a *visitor* at a business could be a robbery victim, and the court held it was improper to instruct the jury in a manner which removed the element of possession from the crime of robbery so as to allow a conviction merely based on a forceful taking in the presence of the visitor. (*Id*. at pp. 759, 762-765.) However, *Nguyen* was not presented with, nor does it address, the issue of the appropriate standard to evaluate an employee's constructive possession.

The opinion in *Jones II*, rendered before *Nguyen*, cites in its analysis *People v. Mai* (1994) 22 Cal.App.4th 117, the case overruled by *Nguyen* as improperly dispensing with the requirement of possession. (*Jones II, supra*, 82 Cal.App.4th at p. 490; *People v. Nguyen, supra*, 24 Cal.4th at p. 762.) Given our Supreme Court's reiteration in *Nguyen* of the importance of the element of possession to support a robbery conviction, we conclude a fact-based inquiry regarding constructive possession by an employee victim is appropriate. That is, we conclude the proper standard to determine whether a robbery conviction can be sustained as to an employee who does not have actual possession of the stolen property is whether the circumstances indicate the employee has sufficient representative capacity with respect to the owner of the property, so as to have express or implied authority over the property. Under this standard, employee status does not alone

as a matter of law establish constructive possession. Rather, the record must show indicia of implied authority under the particular circumstances of the case. To illustrate, a janitor may well be deemed to have implied authority if all other employees who handle the cash are gone. (*People v. Downs, supra,* 114 Cal.App.2d at pp. 765-766.) On the other hand, by virtue of his job title charging him with guarding the premises, a security guard may be deemed to have authority even when other employees who handle the property are present. (*People v. Miller, supra*, 18 Cal.3d at pp. 880-881.)

B. *Instructions*

With these principles in mind, we evaluate Frazer's contention the jury was improperly and inadequately instructed.

1. *Special Instruction on Employee Possession*

The jury was given the standard instruction for robbery contained in CALJIC No. 9.40: "Every person who takes personal property *in the possession of another*, against the will and from the person or immediate presence of that person, accompanied by means of force or fear and with the specific intent permanently to deprive that person of the property, is guilty of the crime of robbery in violation of Penal Code section 211. [¶] 'Immediate presence' means an area within the alleged victim's reach, observation or control, so that he or she could, if not overcome by violence or prevented by fear, retain possession of the subject property. [¶] 'Against the will' means without consent. In order to prove this crime, each of the following elements must be proved: [¶] 1. A person had *possession of property* of some value however slight; [¶] 2. The property was taken from that person or from his or her immediate presence; [¶] 3. The property was taken

against the will of that person; [¶] 4. The taking was accomplished either by force or fear; and [¶] 5. The property was taken with the specific intent permanently to deprive that person of the property." (Italics added.)

A special instruction was also given: "Any employee confronted and exposed to force or fear can be the victim of a robbery *even without personal property in their immediate control and possession.*" (Italics added.)

Frazer argues that the special instruction removed the element of possession from the definition of robbery because it told the jury that as long as the victim was an employee, then the requirement of possession no longer applied.[5] We disagree. The instruction tells the jury that employees may be victims even when the property is not in their "*immediate* control and possession." (Italics added.) Particularly given the clear and twice repeated statement in CALJIC No. 9.40 read to the jury that possession is an essential element that must be proven, reasonably intelligent jurors would have understood that the word "immediate" qualified the word "possession" as well as the word "control." Thus, the special instruction did not tell the jury that the employee need not possess the property, but rather that the employee need not *immediately* possess the property. That is, the jury was properly told that an employee who is not immediately handling (i.e., controlling and possessing) the stolen property may still be found to

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5 Frazer's counsel's failure to object does not waive his challenge on appeal because it pertains to the trial court's sua sponte duty to instruct correctly on the basic principles of law applicable to the case. (*People v. Smithey* (1999) 20 Cal.4th 936, 976-977, fn. 7; *People v. Oden* (1987) 193 Cal.App.3d 1675, 1683.)

possess the property. Although not a model of clarity, the special instruction was a proper statement of the law. (*People v. Miller, supra*, 18 Cal.3d at p. 880 [employee may possess employer's property even if not in immediate control of the property].)

Frazer's assertion that the special instruction given in his case contains an error comparable to the erroneous instruction given in *Nguyen* is incorrect. The *Nguyen* special instruction stated: "'To be a victim of robbery, however, a person need not own, possess, be in control of, or even have the right to possess or control the property sought by the perpetrator. A victim may be an employee or visitor who becomes subject to the application of force or fear utilized to obtain the property of another person, owner of a business or employee.'" (*People v. Nguyen, supra,* 24 Cal.4th at p. 759.) Unlike the *Nguyen* instruction which expressly told the jury the victim of a robbery need not possess or be in control of the stolen property, the instruction given here merely explained that the possession and control need not be immediate.

We agree with Frazer that for purposes of clarity the trial court should have defined constructive possession for the jury,[6] and then given a special clarifying

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6 CALJIC No. 1.24 explains the difference between actual and constructive possession: "There are two kinds of possession: actual and constructive possession. [¶] Actual possession requires that a person knowingly exercise direct physical control over a thing. [¶] Constructive possession does not require actual possession but does require that a person knowingly exercise control or the right to control a thing, either directly or through another person or persons. [¶] One person may have possession alone, or two or more persons together may share actual or constructive possession."

instruction.[7] The jury was not expressly told that possession can include constructive possession based on the *right to control* rather than direct physical control at the moment. Nevertheless, the special instruction, by telling the jury that an employee who is not "in immediate control and possession" of the property can still be a victim, impliedly told the jury that possession may arise when there is a right to control (i.e., nonimmediate control and possession) as opposed to physical control. Thus, any error in this regard was harmless because the instructions as given adequately apprised the jury of the governing legal principles that the employees must have possessed the stolen property, although the possession could be constructive in that the control and possession did not need to be immediate. (See *People v. Dieguez* (2001) 89 Cal.App.4th 266, 277-278 [instructional error which does not remove material issues from jury does not require reversal unless it is reasonably probable a more favorable result would have been reached].)

The prosecution's closing argument also indicates the harmlessness of any instructional error arising from lack of clarity in the instructions. The prosecution acknowledged the essential element of possession, and although arguing all the employees had constructive possession, the prosecution did *not* suggest that employee status eliminated the need to prove possession. Rather, the prosecution confined its argument to the concept that the property need not be in the employee's immediate

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7 The special instruction given in *Jones I* is clearer than the special instruction given in this case. The jury in *Jones I* was given the standard constructive possession instruction, and then specially instructed that "'A store employee may be the victim of a robbery even though he or she is not its owner and not at the moment in immediate control of the stolen property.'" (*Jones I, supra*, 42 Cal.App.4th at p. 1052.)

control or possession—i.e., the employees did not have to have the cash on their person, as long as they could access it through the manager.[8]

2. *Immediate Presence*

Frazer also argues that the special instruction removed the element of "immediate presence" from the jury's consideration. Again, we disagree. As the jury was instructed, the concept of presence does include the concept of control, in that presence can encompass an area within the victim's "reach, observation or control, so that he or she could, if not overcome by violence or prevented by fear, retain possession of the subject property." The reference to control in the definition of immediate presence refers to """an area within which the victim could reasonably be expected to exercise some physical control over [her] property.""" (*People v. Hayes* (1994) 52 Cal.3d 577, 627.) The special instruction telling the jury that the property need not be in the employee's "immediate control and possession" does not on its face refer to this "control" aspect of immediate presence.

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8 The prosecution argued: "Now, possession is sort of a legal term of art . . . . [¶] . . . [W]e're talking about . . . not just the merchandise of Kragen stores, but also the money that was in the safe, the money that was used in the daily operations of the store. [¶] Now, each of the employees in essence had possession of the money that was in the safe. You'll be told that any employee confronted and exposed to force or fear can be the victim of a robbery even without the person, property or cash in their immediate control or possession. *In other words, you don't have to have it in your pocket. You simply have to have access to it in some fashion or another*. Any of those employees, if they needed more quarters or more twenties out of their safe, they had access to that cash through the manager. And so it's not required that they have it actually on their person in order for them to be the victim of a robbery. They were all constructively in possession of the cash and not just the registers but also the safe because they had access to it. And so you'll be specifically instructed on that point." (Italics added.)

Nor do we believe the jurors would have implied a connection between the special instruction and the immediate presence instruction. Reasonably intelligent jurors would understand that "immediate presence" refers to the location of the employee in relation to the property, whereas "immediate control and possession" in the special instruction refers to the employee's right to use or access the property. CALJIC No. 9.40 twice informed the jury of the requirement of immediate presence and the special instruction does not detract from that requirement.

C. *Sufficiency of the Evidence*

As indicated above, although for purposes of clarity the trial court should have given a constructive possession instruction in conjunction with the special instruction, any error was harmless because the jury was adequately apprised of the rule that employees can possess their employer's property even if they are not immediately handling it. Thus, we reject Frazer's argument that the jury was not presented with the theory of constructive possession and the only convictions that can be sustained are those premised on the managers' actual possession of the property.

As an alternative argument, Frazer asserts there is insufficient evidence to sustain the robbery convictions based on the constructive possession of the six nonmanagerial employees. He asserts there was no evidence these employees had access to the stolen money.

To evaluate a challenge to the sufficiency of the evidence, we evaluate the entire record and draw all reasonable inferences in support of the judgment, to determine whether there is evidence that is reasonable, credible, and of solid value from which a

reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Wader* (1993) 5 Cal.4th 610, 640.)

As the prosecution acknowledged in closing argument, the record suggests the only persons who could open the safes at the Kragen stores were the managers (Serrano and Naranjo). However, to the extent nonmanagerial employees could access the cash registers and/or product inventory in order to service the customers, they could reasonably be deemed in constructive possession of the money in the safe via their access to the manager. That is, the entire retail team could reasonably be viewed as having implied authority over whatever property was necessary to handle the sales, including the money in the safe through the manager.

Regarding the Convoy Street Kragen store, the record shows there were two employees assigned to service the customers (manager Serrano and part-time employee Kraus), and three employees assigned to stock the shelves because it was "weekly truck night." Serrano testified that the night of the robbery he "had a crew working" with him, making no distinction between the functions of the crew. Serrano, who was scheduled to service the customers that night, testified he was putting parts away when the robbery commenced. Employee O'Reilly, who was on the "truck crew" that night, described the practice of greeting and offering to help customers as they walked in.[9] Given these

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9 When describing Klaus's greeting of Frazer and the accomplice when they entered the store, O'Reilly testified: "We always greet the people when they come in and ask them if we can help them . . . ."

O'Reilly testified that he was an assistant manager at Kragen at the time of trial, but did not indicate whether he held this position at the time of the robbery.

indications of overlap between the functions of the "truck crew" and the employees servicing the customers, the jury could reasonably infer that the entire staff interchangeably stocked shelves, serviced the customers, and had access to the cash registers and (via the manager) the safe, with their primary duties depending on how they were scheduled for that particular shift.

Regarding the Euclid Avenue Kragen store, all three employees were working on the computers at the parts counter. This evidence supports an inference that they were all part of the retail team, with constructive possession of the money in the cash register and, through the manager, the money in the safe.[10]

Based on the evidence in the record that all the Kragen employees worked together as a retail team, there is sufficient evidence to support a jury finding beyond a reasonable doubt that all the employees had implied authority over, and therefore constructively possessed, the money that was stolen.

II. *Waiver of Rights*

A. *Background*

Frazer argues his admissions were erroneously admitted because he did not knowingly and intelligently waive his *Miranda*[11] rights. He asserts lack of voluntariness is shown because he was under the influence of PCP when he waived his rights and was

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10 Employee Campa was also present during the March 2000 Euclid Kragen robbery (the deadlocked counts), at which time she was working at the cash register.

11 *Miranda v. Arizona* (1966) 384 U.S. 436.

interrogated, and further he was not readvised of his rights by the San Diego police after his earlier admonishment by the deputy sheriff at K-Mart. He asserts his confusion is shown by the fact that he requested during the police interrogation that recording devices be turned off, which indicated he did not know even unrecorded statements could be used against him.

At the time of his arrest, the deputy sheriff read him his *Miranda* rights at about 2:30 p.m., and Frazer indicated he understood them and was willing to talk. Frazer told the deputy he went in to K-Mart to take a watch because he did not have any money. The deputy drove Frazer to the Lemon Grove sheriff's substation, where two San Diego police detectives who had been notified of the arrest took custody of Frazer and transported him to downtown San Diego.

Commencing at 5:30 p.m., Frazer was interrogated by the San Diego police detectives. One of the detectives told Frazer she wanted to make sure they were "on the same page," and asked if he remembered being advised of his rights earlier that day. Frazer indicated he did remember, and answered affirmatively when asked if he understood those rights and was still willing to talk. The detective asked about the K-Mart theft, and Frazer began talking about that theft.

When asked by the officers, Frazer denied being on drugs. The interview continued in conversational style about a variety of matters, including the K-Mart theft, Frazer's sadness over the death of his brothers and other personal concerns, several incidents when Frazer was stopped by the police while driving, and other criminal matters involving people Frazer knew. Eventually the detectives told Frazer they had a

Crime Stoppers television show video showing him at one of the Kragen robberies, and encouraged him to talk to them because it was all over. Frazer then asked if there were any recording devices in the room. The detective said yes and offered to turn it off, but told Frazer it was for his own protection. Frazer said he was not saying anything to incriminate himself anyway, and the officer agreed to turn it off. The officer left the room ostensibly to turn it off, and when he reentered Frazer asked about the video camera. The officer ensured him it was off, showing him a video tape on the table. Reminding Frazer that the recorder was now off, the detective asked about the Kragen robberies. Frazer asked again if the recorder was off, and the officer said it was. The video tape was in fact left on.

Without expressly admitting the Kragen robberies, Frazer then spoke about his relief no one was hurt, that he would have to take responsibility in court, and that he was tired and relieved it was over. After again asking and being assured the tape was off, Frazer told the officers he got rid of the property besides cash that was in the safe and they would not be able to find it. The detectives told Frazer they were curious, from an investigative standpoint, why he did not wear a mask during the robberies to conceal his identity. Indicating he would answer the question, Frazer first asked again if all recording devices were off. The officers said yes, and Frazer asked for their word on it. One of the detectives shook Frazer's hand to confirm they were telling the truth, and showed Frazer a page he had just received alerting him the audio was not recording.

The interrogating officer acknowledged at trial that Frazer expressed concern that the conversation was being recorded, that they told him it was not being recorded, and that they asked him about the Kragen robberies after he believed the recorder was off.

Frazer then proceeded to answer the detectives' questions about the Kragen robberies. He explained why he did not at first use a mask and why he targeted Kragen stores, and gave various details about the robberies. He told them he felt a big load was off his back because he had been worried about the impact of the police breaking down the door to arrest him in front of his mother or the children.

After the detective drew a diagram based on Frazer's explanation of his escape route from one of the robberies, Frazer asked if all of it would come out in court. The detective indicated it would, if they ended up in court. The detectives then decided to take a break, and offered to take Frazer to the bathroom.

When he returned from the bathroom, Frazer asked what was on a video tape sitting on the table. Told that it was a video of what they had been talking about and that it could come out in court, Frazer stated he did not say he did anything. He refused to answer any more questions, saying he was tired, he wanted to talk to an attorney, and he stole a watch but did not commit any robberies. Wondering what had caused his sudden change, one of the detectives surmised Frazer had seen the "video on" signal when he went to the bathroom. The interrogation was terminated at this point.

To support his motion to suppress the incriminating statements he made during the interview, Frazer testified he had been smoking PCP since he was a child; prior to his arrest he smoked it every day; he liked to smoke it in the morning because it kept him

high all day; and he smoked it the morning of his arrest at around 9:00 or 10:00 a.m. He testified he did not remember being at K-Mart except when he was grabbed by the security officers, he did not remember the police interview, and if he had not been high on PCP he would not have given the police a two and one-half hour interview.

The trial court viewed a substantial portion of the videotaped interview, and denied Frazer's motion to suppress.

At trial, the deputy sheriff who took Frazer into custody testified that although he did not do a full examination, he observed that Frazer may have been under the influence of a controlled substance when he was arrested because he was sweating profusely. The San Diego police interrogating officer testified she did not think Frazer was under the influence. Frazer unsuccessfully moved for a new trial based on the deputy sheriff's testimony.

B. *Analysis*

The prosecution must prove by a preponderance of the evidence that a defendant's admissions were voluntary in order to introduce them at trial. (*People v. Williams* (1997) 16 Cal.4th 635, 659.) On appeal, we independently review the trial court's determination of the ultimate legal issue of voluntariness, but apply the deferential substantial evidence standard as to factual determinations. (*Id.* at pp. 659-660.) In deciding voluntariness we consider the totality of the circumstances. (*Id*. at p. 660.)

1. *Influence of PCP*

Frazer contends the videotape of his police interview supports his claim he was under the influence of PCP when he was read his rights by the deputy sheriff and during

the interrogation by the police. He asserts the tape shows his answers to the detectives' questions were frequently long, rambling, nonresponsive, or unintelligible, and that he was moving about in an agitated state.

When a defendant voluntarily ingests drugs before his arrest, the courts evaluate whether the totality of the circumstances indicate the defendant's "abilities to reason, comprehend, or resist were so disabled that he was incapable of free, rational choice" when he waived his rights. (*People v. Loftis* (1984) 157 Cal.App.3d 229, 236; *People v. Jackson* (1989) 49 Cal.3d 1170, 1189.) As long as the defendant is capable of free, rational choice, he may still waive his rights even if he is under the influence. (*People v. Loftis, supra*, 157 Cal.App.3d at pp. 235-236.)

We have independently reviewed the videotape of the police interview. Frazer's answers to the detectives' questions were responsive and coherent. We agree with the trial court that the tape does not show he was in a condition that rendered him incapable of free and rational choice, and we defer to the trial court's rejection of his contrary testimony at the motion to suppress.

2. *Failure to Readvise of Rights*

Frazer argues he should have been readvised of his *Miranda* rights prior to the second interrogation by the San Diego police.

Readvisement of rights is not required where the subsequent interrogation is reasonably contemporaneous with a prior knowing and intelligent waiver. (*People v. Lewis* (2001) 26 Cal.4th 334, 386.) The courts examine such factors as the amount of time that has passed since the waiver, changes in the interrogators or location, any official

reminder of the past advisement, the defendant's sophistication or past experience with law enforcement, and any indicia that he subjectively understands and waives his rights. (*Ibid*.)

In support of his argument, Frazer points out that the second interrogation was at a different location, by different interrogators, regarding different crimes. We are not persuaded. The three-hour lapse of time between the advisement by the deputy sheriff and the interrogation by the San Diego police was not lengthy. (See, e.g., *People v. Lewis, supra*, 26 Cal.4th at p. 386 [no readvisement necessary after five hours]; *People v. Mickle* (1991) 54 Cal.3d 140, 170-171 [no readvisement necessary after 36 hours].) The San Diego police detective asked Frazer if he remembered the earlier advisement, and Frazer, experienced with the criminal justice system by virtue of his prior convictions, indicated he did. Although the interrogation was at a different location and by different law enforcement officers, the interview started with a discussion of the same K-Mart crime Frazer had earlier discussed with the deputy sheriff. Under these circumstances, the subsequent interrogation was reasonably contemporaneous with the first interrogation and no readvisement was necessary.

3. *Request to Turn Off Recording Devices*

Frazer does not contend, nor does the law establish, that the detectives' false statements that the tape machine was off rose to the level of unconstitutional coercion. (See *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1240.) Rather, Frazer contends his confusion and lack of understanding that his statements could be used against him in court are shown by the fact that he agreed to speak about the Kragen robberies only after

the police falsely told him the recorder was off, and then refused to talk once he observed it was still on.

"[A] suspect does not invoke his or her right to remain silent merely by refusing to allow the tape recording of an interview, unless that refusal is accompanied by other circumstances disclosing a clear intent to speak privately and in confidence to others." (*People v. Samayoa* (1997) 15 Cal.4th 795, 829-830.) A review of case precedent reveals that whether an express or implicit request to speak "off the record" or not to be recorded establishes a lack of knowing waiver varies from case to case depending on the particular circumstances.

Lack of voluntariness may exist if the circumstances show that the defendant was asserting his right not to incriminate himself or that he erroneously believed only recorded statements could be used against him. (E.g., *People v. Johnson* (1993) 6 Cal.4th 1, 26, 30-32 [request to speak off the record at various points during interview required exclusion of statements pertinent to subject matter then being discussed; other statements were admissible because defendant expressed no general expectation of privacy covering entire interview]; *People v. Braeseke* (1979) 25 Cal.3d 691, 695, 702-703 [after asserting his right to counsel, defendant did not unreservedly institute renewed interrogation because his request to speak off the record indicated he did not realize any statement could be used against him]; *People v. Hinds* (1984) 154 Cal.App.3d 222, 232-238 [under circumstances where numerous *Miranda* violations were committed, young, unsophisticated defendant's request to turn off tape recorder was one more indication of his continuing reluctance to discuss case]; *People v. Nicholas* (1980) 112 Cal.App.3d

249, 263, 266-268 [under circumstances where police used coercive psychological ploys, defendant's request to turn off recorder and speak with one officer in private showed assertion of right to silence and lack of knowing waiver].)

In contrast, voluntariness may be established if the circumstances show, notwithstanding the request to speak off the record or unrecorded, that the defendant otherwise acted in a manner indicating he understood his rights or that the interrogators acted to correct any possible misunderstanding of his rights. (E.g., *People v. Samayoa, supra*, 15 Cal.4th at pp. 828-830 [officer's conspicuous note-taking, which was equivalent to tape recording, precluded any assumption by defendant that his refusal to be tape recorded made his statements off the record]; *People v. Memro* (1995) 11 Cal.4th 786, 832-834 [defendant requested to sweep the room for recording devices and to speak to only one officer whom he trusted; voluntariness shown by defendant's subsequent abandonment of this request for privacy when he allowed other officers to return to room and never halted his statement by asking for counsel]; *People v. Johnson, supra*, 6 Cal.4th at p. 26 [request for no tape recorder; defendant's possible misconception that only recorded statements could be used was clarified by immediate advisement that any statement could be used]; *People v. Maier* (1991) 226 Cal.App.3d 1670, 1677 [defendant was apparently a sophisticated criminal wanted in another state for a series of crimes; his request not to be recorded did not indicate lack of understanding of his rights].)

Having independently reviewed the interrogation tape, we agree with the trial court that Frazer's request that the tape recorder be turned off does not, under the circumstances of this case, indicate he did not understand any statements could be used

against him. Frazer, a middle-aged man with several prior convictions, was not a newcomer to the criminal justice system. When asked by the San Diego police officer whether he remembered being advised of his rights a few hours earlier, Frazer indicated he did and he was still willing to talk. Although the video tape shows Frazer did not want to talk about the robberies if he was being recorded, there is no indication he believed the interview was confidential or private. The officers did not use coercion to make him talk, and Frazer actively participated in the discussion of the crimes and indicated he was relieved it was all over. Under these circumstances, his request to talk unrecorded does not defeat the otherwise strong indications that he understood his rights and wanted to talk to the police.

4. *Totality of the Circumstances*

Examining the totality of the circumstances, we conclude that the facts that Frazer may have used PCP several hours prior to his arrest and interrogation, that he was apparently unwilling to speak if recording devices were on, and that he was not readvised prior to the second interrogation, do not defeat the otherwise clear indicia that he knowingly and intelligently waived his rights and willingly spoke to the officers. The San Diego police interrogator did not believe Frazer was under the influence, his demeanor on the video tape was not that of an incoherent or confused person, and he acknowledged that he remembered being advised of his rights a few hours earlier. The prosecution carried its burden to show voluntariness by a preponderance of the evidence.

III. *Sentencing*

The People concede the trial court erroneously rendered a true finding on a second prior prison allegation.

Frazer was charged with two felony prior prison terms under section 667.5, subdivision (b), which imposes a one-year consecutive sentence enhancement for each term, unless the prison term was served "prior to a period of five years in which the defendant remained free of both prison custody and the commission of an offense which results in a felony conviction." The first prison prior (Superior Court Case Number CR74436), for a 1985 robbery offense, was struck by the trial court.[12] The second prison prior (Superior Court Case Number CR118054), for a 1990 sale of a controlled substance, was found true and used to impose a one-year enhancement.

Frazer was paroled from prison on January 10, 1993, and committed no felonies until the instant offense in November 1999, which is more than five years after his release from prison. As conceded by the People, the second prior prison term enhancement must be stricken and the abstract of judgment amended accordingly.

DISPOSITION

The case is remanded to the trial court with directions to strike the one-year enhancement for the second prior prison term under section 667.5, subdivision (b), and to

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12 The court struck the first prison prior because it was also used to impose a five-year consecutive sentence enhancement for a prior serious felony conviction under section 667, subdivision (a)(1). The court had rendered a true finding as to the first prison prior, mistakenly stating the date of the offense was 1995 rather than 1985. The true finding has no impact because the first prison prior was stricken.

send to the Department of Corrections a corrected abstract of judgment. In all other respects, the judgment is affirmed.

HALLER, J.

WE CONCUR:

KREMER, P. J.

BENKE, J.